Employment Law Alert: DOL Proposed Rule to Impact Exemption Salary Requirements

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As you may recall, the U.S. Department of Labor (DOL) issued a Final Rule on the white-collar exemptions under the federal Fair Labor Standards Act (FLSA), which was to become effective on December 1, 2016 ("2016 Rule"). A successful suit brought by the U.S. Chamber of Commerce resulted in a permanent injunction blocking the 2016 Rule. The Trump administration filed an appeal, but then asked for and obtained a stay of the appeal to allow the U.S. DOL time to propose a new rule with different white-collar salary requirements. On March 7, 2019, the DOL issued the new proposed rule, which rescinds the 2016 Rule and sets new proposed parameters for the white-collar exemption salary requirements ("New Rule").

The New Rule, if it becomes final, will increase the minimum weekly salary amount that must be paid for white-collar employees to be exempt from federal minimum wage and overtime pay rules; however, the increase is not as high as the increase that was set out in the 2016 Rule. In addition, the New Rule would increase the total annual compensation that must be paid for an employee to be exempt as a "highly compensated employee." The DOL estimates that, following a required comment period, the New Rule will go into effect in January 2020. Employers should start preparing now for the potential salary requirement changes.

What Changes Will the Final Rule Impose?

By way of background, the FLSA requires that employees be categorized as either non-exempt or exempt. Non-exempt employees must be paid minimum wage for all time worked and overtime pay for hours worked above 40 in a seven-day workweek. On the other hand, exempt employees are not subject to these requirements and are typically paid a set salary for all time worked.

The most commonly used FLSA exemptions consist of the white-collar exemptions (e.g., executive, administrative, and professional employees), which provide that an employee must satisfy both a weekly salary and a job duties test to fall within one of the exemptions. Currently, the minimum weekly salary that must be paid under the white-collar exemptions is $455, or $23,660 annually. Under the 2016 Rule, this minimum weekly salary was set to double to $913, or $47,476 annually. This 2016 Rule weekly salary amount corresponded to the 40 percentile of the weekly earnings of full-time, non-hourly employees in the lowest-wage U.S. Census Region, as calculated by the U.S. Bureau of Labor Statistics.

The New Rule reflects a substantial salary hike for the white-collar exemptions, but less than the salary proposed in the 2016 Rule. The proposed New Rule sets the salary requirement at $679 per week ($35,308 annually). Unlike the 2016 Rule, the New Rule uses the methodology followed by the DOL in 2014 when it set the current salary amounts. Under the New Rule, the weekly salary amount corresponds to the 20 percentile of earnings for full-time salaried workers at the lowest-wage Census region (the South) and in the retail sector. In addition, the DOL has set the weekly salary amount using the estimated 20 percentile salary amount for January of 2020, which is when it expects the New Rule to become effective.

Unlike the 2016 Rule, the new $679 minimum weekly salary would not be automatically adjusted by the DOL every three years to correspond with the 20 percentile Census figure. Instead, the DOL has stated that it intends to propose updates to the salary levels every four years through notice-and-comment rulemaking.

Like the 2016 Rule, the New Rule would permit the new minimum salary to be made up purely of salary or to be partially satisfied by other types of non-discretionary compensation. Specifically, 10 percent of the $679 weekly salary minimum (or $67.90 per week) can be paid through non-discretionary bonuses, incentives, and commissions (but not boarding or lodging costs). However, unlike the 2016 Rule, the New Rule requires that employees receive payment of the non-standard salary amount at least annually instead of payment at least quarterly. Non-discretionary bonuses are bonuses that are earned based on objective criteria (such as, achieving sales numbers, productivity measures, etc.) rather than being paid or not in the sole discretion of the employer (such as a discretionary holiday bonus).

In addition to the new white collar salary requirement, the New Rule, like the 2016 Rule, also raises the amount that must be paid for another FLSA exemption — the "highly compensated employee." Currently, an employee with total annual compensation of at least $100,000 is "highly compensated" and can be properly classified as exempt. The New Rule, however, will require total annual compensation of at least $147,414 (set at $134,004 under the 2016 Rule) to satisfy the "highly compensated employee" exemption, and this annual amount cannot be based on the costs of board, lodging, insurance payments, retirement contributions, or other fringe benefits.

What Does the Final Rule Mean for Employers?

It is not entirely certain when the Rule will take effect; however, as stated above, the DOL expects the New Rule to become effective in January of 2020. As with all rulemaking, once the New Rule is published in the Federal Register (which has not yet occurred), interested parties will have 60 days to submit comments regarding the New Rule. At the end of the comment period and after considering the comments received, the DOL will issue a final rule. This will likely happen sometime in the fall of 2019. Sometimes a proposed rule will change after the comment period, but sometimes not. We at Gray Plant Mooty anticipate that the salary level will be adjusted and most likely any changes to the proposed New Rule will be minimal.

Based on the New Rule, employers should analyze their employee classifications to determine whether "exempt" positions can remain exempt if the New Rule goes into effect. Employers have several options to consider in preparing to comply with the New Rule, including the following:

- For employees classified as "exempt" who do not meet the new salary requirements, an employer could increase compensation to satisfy the new salary requirements.
- "Exempt" positions that do not satisfy the new salary requirements can be reclassified as non-exempt, in which case employees holding these roles will become non-exempt and be subject to the FLSA's time tracking, minimum wage, and overtime pay requirements.
- To minimize overtime pay obligations, employers can review and refresh policies to limit hours worked to 40 or less in a workweek. In addition, an employer might hire additional employees or redistribute job duties to more than one employee to minimize overtime hours and corresponding pay requirements.
- Employers can also consider wage rate changes for employees. So long as a non-exempt employee makes at least minimum wage for all hours worked and an employer satisfies any contractual pay obligations, wage rates can be prospectively changed to reduce the cost impact of the Final Rule on positions that may need to be reclassified as non-exempt.

Please visit our blog, the Modern Workplace, for a more detailed analysis of this Final Rule in the coming months, as well as previous posts on the FLSA.

For any immediate questions regarding the New Rule or other wage-related matters, please contact a member of the Gray Plant Mooty Employment Law team.